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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. ... 449.

THE ORDER OF RAILROAD TELEGRAPHERS, an Unincorporated Association, V. O. GARDNER, President, W. I. CHRISTOPHER, Deputy President, J. M. BRUCE, General Chairman, and H. E. MILLER of McAllen, Texas, and L. F. MOORE of Opelousas, Louisiana, and A. J. FUSELIER of Eunice, Louisiana,

Petitioners,

vs.

NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, a Louisiana Corporation, ASHERTON AND GULF RAILWAY COMPANY, a Texas Corporation, BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY, a Texas Corporation, HOUSTON NORTH SHORE RAILWAY COMPANY, a Texas Corporation, IBERIA, ST. MARY AND EASTERN RAILROAD COMPANY, a Louisiana Corporation, NEW IBERIA & NORTHERN RAILROAD COMPANY, a Louisiana Corporation, THE ORANGE & NORTHWESTERN RAILROAD COMPANY, a Texas Corporation, RIO GRANDE CITY RAILWAY COMPANY, a Texas Corporation, THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, a Texas Corporation, SAN ANTONIO SOUTHERN RAILWAY COMPANY, a Texas Corporation, SAN ANTONIO, UVALDE & GULF RAILROAD COMPANY, a Texas Corporation, SAN BENITO AND RIO GRANDE VALLEY RAILWAY COMPANY, a Texas Corporation, SUGAR LAND RAILWAY COMPANY, a Texas Corporation (Said Above Mentioned Railroad Corporations Being Collectively Known as the "GULF COAST LINES"), INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY, a Texas Corporation, and GUY A. THOMPSON, Trustee for Each of the Foregoing Railroad Corporations, and BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, an Unincorporated Association, and H. R. LYONS, Vice Grand President,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals,

Eighth Circuit,

and

BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To The Honorable Frederick M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show as follows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a representative suit in two counts filed in the United States District Court for the Eastern Judicial District of Missouri, alleging violation of statutory and contract rights of individual railroad telegraphers (petitioners herein and plaintiffs below) under the provisions of the Railway Labor Act (45 U. S. C. A. 151-188). The individual employees who are petitioners brought this action in their own behalf and in behalf of, and as representatives of, all the members of the telegraphers' craft similarly situated, employed at stations on the Texas and Louisiana lines of the above named carriers (hereinafter referred to as the carriers) and on the same seniority lists (R. 11). The Order of Railroad Telegraphers (hereinafter called the O. R. T.) and several of its officers were joined as representative plaintiffs. The carriers, with the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as the B. R. C.), are the respondents herein.

The controversy concerns the station service of the respondent carriers on certain Divisions in Texas and Louisiana, where both clerks and telegraphers perform clerical work. Historically, the station agent, agent-telegrapher, or telegrapher-clerk (members of the telegraphers' craft and class) were men-of-all-work in the operation of the freight and passenger stations. When the duties of the station agent or telegrapher-clerks increased with traffic, there was a progressive division of labor, and, notably, clerks were employed to perform purely clerical tasks, if additional telegraph service was not required.

The litigation arises from an attempt by the B. R. C., **by contract with the carriers**, to obtain a monopoly of all clerical work, including that customarily done by telegra-

phers in the time not required in communication duties. In this contract the carrier granted to the Clerks monopolistic rights to all clerical work, and, although the petitioning telegraphers were vitally affected, the said contract was made without notice to petitioners; and then enforcement thereof was sought in six proceedings before the National Railroad Adjustment Board, where petitioners were denied hearing. The purpose of this litigation is, therefore, to have the contract declared invalid as against these petitioners and to enjoin the carriers from enforcing the awards of the Board so entered without hearing.

The legal issues. The most pressing and perhaps the most important legal issue in this case has been quite overlooked or ignored in the opinion of the Circuit Court of Appeals. This issue arises under the terms of Section 3, First (j), of the Railway Labor Act, which requires notice and opportunity for hearing to "employees involved" in grievance procedure before the National Railroad Adjustment Board and also involves due process under the Fifth Amendment. In this particular case twenty-two employees of the respondent carriers (telegraphers) carefully notified the Third Division of the National Railroad Adjustment Board that they desired to be heard through their bargaining agent, the O. R. T.,* in six claims filed with the Board by the respondent Brotherhood of Railway Clerks, which sought to rearrange station forces so as to deprive the telegraphers of positions held and listed in their own collective bargaining contracts. The right asserted by the O. R. T. and other petitioners, throughout, is the right of individual employees to hearing under the terms of the Act, or under the principles of due process, where they as third parties will be clearly adversely affected if the claims

* Specific authority was granted to the O. R. T. to represent these individuals, so that the question in the case of Elgin, Joliet and Eastern R. Co. v. Burley (1945), 325 U. S. 711, affirmed on rehearing March 25, 1946, 90 L. Ed. 706, is not involved.

of another craft are sustained, and if the awards thereon are permitted to stand.

The question is one of long-standing disagreement on the National Railroad Adjustment Board itself and among its referees and requires clarification by this Court. This Court has not passed upon the question, although this Court has declared in the recent case of **Order of Railway Conductors v. Pitney** (1946), 90 L. Ed. 279, that the Adjustment Board, in interpreting contracts of one craft, must necessarily consider the contracts and customs of other crafts affected. The circuit courts of appeals have not heretofore considered the problem for almost ten years, when the right to hearing was affirmed in two seniority cases, which are in conflict with the present decision.*

The claims asserted by the clerks in the proceedings above mentioned were based upon a collective bargaining contract, called the "Memorandum Agreement," made by the respondent carriers also without notice to petitioners. Accordingly, the other legal issue in the case involves the question of the legality of a collective bargaining agreement made by one craft and class (here the Clerks) where the carrier has failed to give notice to another craft and class (here the Telegraphers) that the proposed contract involves changes in rules and working conditions of the latter. The case presents the factual situation arising in **O. R. C. v. Pitney**, supra, **plus the important ingredient lacking in that case**, namely, that by demand for hearing and denial thereof petitioners in the instant case exhausted their administrative remedies before the Board. Furthermore, the Railroad Adjustment Board has, in the awards above mentioned, actually interpreted the contract complained of to require rearrangement of station forces and abolition of positions of the telegraphers. The spe-

* Nord v. Griffin (1936, C. C. A. 7th), 86 F. (2d) 481, certiorari denied 300 U. S. 673; Estes v. Union Terminal Company (1937, C. C. A. 5), 89 F. (2d) 768, hereinafter more fully discussed.

cific illegality alleged with respect to the clerks' contract is the failure to give notice to the petitioners or their bargaining agent as required by Section 6 and Section 2, Seventh, of the Railway Labor Act, which requires 30 days' notice by the carrier of intended changes in rules, rates of pay and working conditions as embodied in agreements.

The trial court, after hearing upon the merits, dismissed both counts on the ground that the controversy was "non-justiciable." The Circuit Court of Appeals vacated the decree below, but denied relief, and remitted the case, not for re-trial or reconsideration, but with directions to petitioners to file new proceedings with the National Railroad Adjustment Board to interpret their own contract, when that very same Board has refused to hear them and has already decided the issue.

Brief statement of facts. It is necessary for an understanding of this case to present the facts in somewhat more detail, as follows:

In an attempt by the clerks to obtain all or substantially all clerical work in the station service and thereby entirely exclude the telegraphers, the respondent B. R. C. induced the respondent carriers by threat of strike (R. 523-24), **and without notice to petitioners** or their bargaining agents (R. 118) to execute a "Memorandum Agreement," effective November 1, 1940, reciting that clerical work "belongs to" the clerks and by which the carriers granted monopolistic rights to the clerks in respect to clerical work of the kind mentioned in the clerks' scope rules.* Armed with this agreement, the clerks set up exclusive

* The first paragraph of the agreement read as follows:

"(a) It is recognized and agreed that all of the work referred to in Rule One of the Agreement dated November 1, 1940, between the carrier and the Brotherhood **belongs to and will be assigned** to employees holding seniority rights and working under the Clerks' Agreement except as provided below" (R. 109-10).

claims, even to clerical work customarily assigned to the telegraphers, in the positions held by them as "telegrapher-clerks" and otherwise under the telegraphers' collective contract with the carriers (R. 513, 515, 575, 577).

The illegal contract has already been interpreted. The purpose of the first count of the complaint was to declare this Memorandum Agreement invalid on legal grounds because it was made without the notice to the telegraphers required by the Railway Labor Act, and said count also prays for injunctive relief against its enforcement. The count also alleges the interpretation of the Memorandum Agreement by the National Railroad Adjustment Board in the awards mentioned and which, incidentally, are the subject of Count II of the complaint. **The Board's awards showed conclusively that the Memorandum Agreement would, in fact, change the rules and working conditions of telegraphers by depriving them of their positions and seniority** (R. 162-248).

The effect of the Memorandum Agreement upon the rules and working conditions of the petitioners is graphically illustrated in this case by the concrete facts, developed in the proof, with respect to the petitioners Miller, Moore and Fuselier, who are individual representative members of their craft and class on the seniority list of the respondent carriers. The positions held by them at Opelousas, Louisiana, Eunice, Louisiana, and McAllen, Texas, respectively, were the very subject of claims resulting in awards of the National Railroad Adjustment Board (attacked in Count II of this case). For example, in the claim resulting in award 2255, the B. R. C. insisted that the Memorandum Agreement required, and that the carrier had expressly agreed, to abolish the position of assistant agent at Opelousas, Louisiana, occupied by Moore and substitute a cashier's position therefor (a clerk's position) (R. 515, 575). In the claim resulting in award

2253, the B. R. C. insisted that the Memorandum Agreement required and that the carrier had expressly agreed to abolish the position of day shift telegrapher at Eunice, Louisiana, occupied by petitioner Fuselier, and substitute a cashier's position therefor (R. 513, 577). Not only do the awards show that the purpose of the proceedings was to rearrange the station forces at these points so as to displace telegraphers, but in addition the testimony of these very employees holding the positions in question, shows how they would be displaced from their employment and moved down on the seniority list, and possibly placed on the "extra list" as a consequence of the rearrangement of the station forces contemplated by the Memorandum Agreement as construed by the Adjustment Board in awards attacked in the second count of this case (R. 409, 10).

Denial of hearing by the Adjustment Board. The second count involves the right of individual petitioners Moore, Miller, Fuselier and others involved to notice of the Adjustment Board proceedings instituted by the respondent B. R. C. and to hearing before the Board. Section 3, First (j) of the Act requires notice to "employees involved." As above stated, the submissions or claims of the B. R. C. to the Board and the awards entered thereon show on their face that rearrangement of the station forces on the lines of the carriers was contemplated. The Adjustment Board denied application of these petitioners to intervene and be heard. Petitioners contend that by denying the right of petitioners to such a hearing, the Adjustment Board violated the individual rights of petitioners under Section 3, First (j) of the Railway Labor Act. Petitioners also contend that the procedure before the Adjustment Board constitutes a denial of due process. The second count asks the Court to enjoin the carriers' enforcement of the six specific awards of the National Railroad Adjustment Board, which require the rearrangement of the station

forces on the lines of the respondent carriers so as to deprive the petitioners and others similarly situated of the positions held under their own collective contract with the carriers. Petitioners ask the court for injunctive relief against the carrier because enforcement of the Memorandum Agreement and of the awards based thereon threatens the petitioners with irreparable injury and because the awards enforcing the Agreement were entered after denial of hearing to the petitioners by the Third Division of the National Railroad Adjustment Board.

The case, therefore, concretely and graphically demonstrates the evil resulting from the illegalities herein complained of:

(1) The failure to give the telegraphers or their bargaining representative notice of proposed changes in their working conditions in violation of Section 2, Seventh, and Section 6 of the Railway Labor Act.

(2) The failure and refusal of the National Railroad Adjustment Board to hear these individuals as employees involved, as plainly required by Section 3, First (j) of the Railway Labor Act.

Importance of the issues. It is submitted that the case is of importance not merely from the fact that these individuals and many others would lose employment and seniority rights, but also because both of the legal issues are subjects of long controversy as hereinafter fully discussed. There are several cases now pending in the District Courts involving the issue of application of contracts affecting other crafts where no notice was given to such other crafts.* Furthermore, the case is highlighted by glaring

* For example, Howard v. Thompson, case No. 4452, in the United States District Court at St. Louis, although bottomed on the doctrine of Steele v. L. & N (1944), 323 U. S. 192, also sets up the same ground of illegality as here asserted. We are informed there is a similar case pending in Kansas City involving the Santa Fe Railroad.

irregularities in the manipulation of the membership of the Third Division of the National Railroad Adjustment Board and also in the procedure which that Division followed in reaching the awards attacked in the second count. The labor members of the Board seemed quite aware of the injustice they were inflicting upon the telegraphers, because they resorted to devious methods and subterfuges to "deadlock" the case and to avoid hearing; awards 2253-2258 were handed down in blatant disregard of the telegraphers' request for hearing. There is no disagreement between the petitioners and respondents as to what happened before the Board. The procedure of the Board is set forth in the record in a stipulation of fact which is based largely upon depositions taken at the Board's offices (R. 145-157). The irregularities in question are discussed in more detail in petitioner's brief in support of this petition.

Erroneous application of prior decisions of this Court. The trial court held that it was without jurisdiction to decide this controversy, reaching that conclusion before this Court had decided the case of **Order of Railway Conductors v. Pitney** (1946), 90 L. Ed. 279.* Upon appeal to the Circuit Court of Appeals the latter court vacated the decree of the trial court but, on the authority of the Pitney case, supra, referred the case back to the District Court with directions to stay proceedings while the **petitioners** commenced their own proceedings before the Adjustment Board for an interpretation of the **petitioners'** contract with the respondent carriers. The court below overlooked the essential fact that the Adjustment Board had already interpreted (in the awards in question) the respondents' contract here complained of. The court below overlooked the futility of such a proceeding by peti-

* The Trial Court erroneously relied upon Switchmen's Union v. National Mediation Board (1943), 320 U. S. 297, and the companion cases, involving representation disputes referable to the Mediation Board.

tioners, as admitted by the respondents in their pleadings (R. 119).

Petitioners submit that the matters involved in this case are similar to those in the Pitney case, but that this case is the Pitney case **plus**: (a) It is the Pitney case plus prior interpretation of the alleged illegal agreement by the Adjustment Board; (b) it is the Pitney case plus a request to the Board for hearing by employees involved, and denial thereof.

Furthermore, the case presents in the second count an issue not presented by the Pitney case and apparently overlooked by the Circuit Court of Appeals, namely, the very important procedural question of the right of individual third parties (employees involved) to hearing in proceedings before the National Railroad Adjustment Board.

This is a contract case against the carrier. For the sake of clarity one additional aspect of the facts should be submitted: There has been a "red herring" in this case, namely, the bogey of "jurisdictional disputes." We disclaim any suggestion that either the courts or the Adjustment Board should be asked to decide any "jurisdictional dispute" between the labor organizations in this case. The carriers made the offending contract, and the B. R. C. chose that route, unmindful that the Railway Labor Act regulates such matters. The B. R. C. made their jurisdictional ambitions a subject of legal cognizance.

Limited relief here asked has been denied. The legal relief here asked is also limited: We suggest with respect to the National Railroad Adjustment Board merely this—that when it is called upon to interpret collective contracts of one labor organization with a carrier, the Board should first notify and, upon request, hear all individuals involved or adversely affected, and second, it should consider the customs and contracts of other crafts, throwing light upon

the problem of interpretation and application of the agreements presented. This is no more than was suggested by this court in the Pitney case.* Second, as to the province of the courts, we ask only that when a legal problem is clearly and compellingly presented to the courts, involving the legality of a contract and the legal rights of a craft to notice of changes in their working conditions, that the courts relieve against violation of the law; and further, that when a court is presented with a situation where an award is entered by the National Railroad Adjustment Board that threatens the contract and seniority rights of individuals, and those individuals are not granted any hearing, that the awards of the Board should be enjoined and held for naught by decree of the court.

The action of the Circuit Court of Appeals is a denial of relief. The respondents were successful in misleading the trial court into treating this case as an inter-union controversy and not a lawsuit to protect contract rights. The trial court completely lost sight of the fact that the O. R. T. did not enter this litigation in its own behalf, or in any proprietary right, and that it never sought or desired to enter the proceedings of the Adjustment Board in any such proprietary capacity, or on its own behalf.

Individual employees are complainants here. It was twenty-two individual employees represented by the O. R. T. who sought to be heard before the Board. The right of these individuals to hearing is the legal issue of the second count in this case. They are about to lose their jobs; the courts deny relief and do no better than send them back to the very Adjustment Board which ordered their positions abolished.

* "For O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. and, since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood." 90 L. Ed. 279, l. c. 283.

II.

JURISDICTIONAL STATEMENT.

The petitioners state that the basis on which it is contended that this Court has jurisdiction to review the judgment or decree in question is contained in Title 28, U. S. Code, Section 347 (28 USCA 347, Sec. 240 of the Judicial Code as amended), providing that in any case, civil or criminal, in a Circuit Court of Appeals, it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, to require by certiorari that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect as if the cause had been brought there by unrestricted writ of error or appeal. The jurisdiction of the district court was invoked under Section 24 (8) of the Judicial Code [28 USCA, Sec. 41 (8)] because the cause of action alleges violation of the Railway Labor Act (45 U. S. C. A. 151-188), an Act regulating commerce, and requires construction of that Act throughout. Violation of the due process clause of the Federal Constitution was an additional claim under Count II of the complaint; the action therefore was also within Section 24 (1) of the Judicial Code [28 USCA 41 (1)].

III.

QUESTIONS PRESENTED.

1. Where a carrier has entered into a contract with the bargaining representative of one craft and class (here the clerks), which contract by its terms purports to give that craft and class monopolistic rights to all clerical work, admittedly a part of the duties of positions covered by the collective agreement of another craft and class (here the telegraphers), and it is admitted that the latter craft and class was given no notice by the carrier as required by Section 6 and Section 2, Seventh, of the Railway Labor Act

(requiring carriers to give 30 days notice of an intended change in rules or working conditions), and it is further shown that the National Railroad Adjustment Board has interpreted such contract to require a change in the station forces and elimination of such positions of telegraphers, must the court "stay its hand" until the aggrieved class and craft brings an independent proceeding against the carriers in the Adjustment Board to obtain relief that has already been denied?

2. When awards of the National Railroad Adjustment Board are presented to the court showing that the Board has already interpreted a contract of one class or craft (here the Clerks) so as to change the working conditions of another craft or class (here the telegraphers) by depriving them of employment and seniority, and it is shown that the said contract was admittedly and deliberately executed without notice to the aggrieved craft as required by the provisions of the Railway Labor Act, shall the court withhold relief to the aggrieved craft, when the Board has already refused to hear the aggrieved craft in connection with its interpretation and it is admitted that direct resort by the complaining craft to the Board would be futile?

3. When the bargaining representative of the Clerks' craft and class files complaints with the National Railroad Adjustment Board, directly alleging that a carrier is violating its collective labor agreement by permitting members of another craft and class (the Telegraphers) to perform work covered by the Clerks' agreement, may the Board, in the face of such allegations and after abundant proof that the proceedings are directed toward changing the rules and working conditions of the telegraphers, exclude individual members of the Telegraphers' craft or class from hearing as to the scope of the agreements and as to the proposed changes in telegraphers' rules and

working conditions sought by the Clerks, in view of the provisions of Section 3, First (j) of the Railway Labor Act requiring notice of hearings to "employees involved"? Under such circumstances, does it not clearly appear that Section 3, First (j) of the statute "is so obviously violated" that a court of equity should intervene "to protect the interest of individuals," and that if the court of equity does not intervene then there will be not only "a sacrifice or obliteration of a right which Congress created" but also a denial of due process.*

4. The case, incidentally, presents important questions as to the limits of procedural irregularities of the Adjustment Board in the handling of claims resulting in awards 2253-2258. Should not the awards of the Adjustment Board be held for naught and enforcement thereof enjoined when the stipulated facts show manipulation of the membership of the Adjustment Board at the instance of the President of the B. R. C. prior to and during the pendency of these cases, and the proof shows further that the referee was appointed by the Mediation Board upon a fictitious deadlock and certification thereof, and the proof shows further that the awards were never legally adopted by the Third Division of the Adjustment Board because of the illegal appointment of a member of the Board, contrary to the requirements of the Act with respect to the filling of vacancies in said division?

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* Quotes are from the language of this Court in O. R. C. v. Pitney, supra, with cases cited in that opinion.

IV.

REASONS RELIED ON FOR GRANTING OF THE WRIT.

(A) The decision of the court below is in conflict with the decision of other circuit courts of appeal on the same matter.

The decision of the court below, the Circuit Court of Appeals, Eighth Circuit, is in direct conflict with the decision of the Circuit Court of Appeals, Fifth Circuit, in the case of **Estes v. Union Terminal Company** (1937), 89 Fed. (2d) 768, and the decision of the Circuit Court of Appeals, Seventh Circuit, in the case of **Nord v. Griffin** (1936), 86 Fed. (2d) 481 (certiorari denied 300 U. S. 673), both of which held that individual employees (not represented by the organization submitting a claim to the Adjustment Board) who may be adversely affected by an order of the Board, are "employees involved" and should be given reasonable notice of hearings by the Adjustment Board. A discussion of the conflict of the instant case with the said prior decisions appears at pages 32-34 and 35, 36 of the brief in support of this petition.

(B) The Circuit Court of Appeals, Eighth Circuit, has decided an important question of federal law which has not been, but should be, settled by this Court, in that the court held that the National Railroad Adjustment Board is not required to give notice to third party employees adversely affected by its awards and that such awards are valid notwithstanding the requirements of Section 3, First (j) of the Railway Labor Act calling for notice to "employees involved."

It is respectfully submitted that the settlement of this question is necessary for the orderly administration of the Railway Labor Act. There is a long standing disagreement among the referees acting under Section 3 of the

Act, with respect to the propriety of Adjustment Board awards which impair and destroy the employment rights of third parties, without notice or hearing to such third parties.

Decisions of Referees acting under the Act have been in conflict. Referee Bruce Blake, Judge of the Supreme Court of the State of Washington, sitting with the Adjustment Board in 1944 in Awards 2596 and 2597, dismissed "without prejudice" claims filed by the B. R. C. on the same complaint as the awards attacked herein. Referee Blake assigned as reason for dismissing the claims: "No such claims should be sustained without granting a hearing to the craft which would lose, as well as the one which will gain by the wanted decision."

Referee Swaim in Awards 2253-2258, attacked in Count II herein, reached a result directly contrary to that of Referee Blake in Awards 2596 and 2597. Referee Swaim ruled that Section 3, First (j) of the Act requires that notice of a hearing be given only "to the organization submitting the claim and to the carrier or carriers involved" (R. 178). Referee Swaim held that the only "parties" involved in a proceeding before the Adjustment Board are the "parties who negotiated and executed the agreement" that is before the Board for interpretation (R. 178). Referee Swaim rejected the contention that the Board could not enter valid awards when "there has been no notice of a hearing, nor an opportunity to be heard given to the employees outside of the agreement who are now performing the work which the organization (submitting the claim) contends is covered by the agreement" (R. 177-184).

There is bitter disagreement among the members of the Adjustment Board as to the meaning of "Employees Involved". The record in this case demonstrates that there is bitter disagreement among the members of the Adjust-

ment Board as to the meaning of "employees involved", as used in Section 3, First (j) of the Railway Labor Act.

The Mediation Board refused to appoint a referee in these very cases on March 1, 1943, on the procedural issue of what parties are entitled to notice (see letter dated March 1, 1943, R. 257). The labor members of the Board then tried again to certify a deadlock on the claims resulting in awards herein attacked without notice of hearing to anyone (R. 260-261).

In correspondence with the Mediation Board the carrier members charged that the labor members were guilty of "impropriety" (R. 263), and that they had acted in "collusion" with General Chairman Dyer of the B. R. C., by having Dyer withdraw his request for oral hearing on March 9, 1943, and declaring a deadlock on the following day, March 10 (R. 262). The carrier members also charged that the alleged deadlock upon the merits was a "mere superficiality" (R. 266).

The disagreement between the carrier members and the labor members was so acute that it was impossible for them to furnish a joint statement to the Mediation Board (R. 271).

The labor members denied the charges of impropriety and collusion (R. 264). The labor members concluded that the procedure recommended by the carrier members of the Adjustment Board is "an asinine and ridiculous procedure, to say the least" (R. 270-271).

As pointed out by the carrier members in a letter to the Mediation Board dated April 13, 1943, the extremity of the above quoted statements illustrates very clearly the bitter disagreement among the members of the Adjustment Board as to "proper procedure" (R. 274).

Neither the Rules of the Adjustment Board (R. 277) nor the Rules of the Third Division (R. 281) contain any provision either for or against intervention or notice to third

parties involved. The correspondence between the Mediation Board and the members of the Third Division clearly indicates that "there has never been any established agreed to procedure" (R. 268).

This long controversy should be resolved. The present case affords an opportunity to this Court for a construction of Section 3, First (j) of the Railway Labor Act, and it is respectfully submitted that a decision on the issue presented will clarify and strengthen the Railway Labor Act.

(C) **In deciding this case the court below has decided it in a way that is in conflict with principles announced in applicable decisions of this Court.**

(1) The court below has misconstrued the decision of this Court in the Pitney case, as requiring the petitioners to bring a circuitous and futile proceeding before the Adjustment Board for an interpretation of the petitioners' own contract, which is not the alleged illegal contract. The court below failed to appreciate that in the Pitney case, the Adjustment Board had not been given an opportunity to interpret the alleged illegal contract. The instant case is presented to the court **after** the Adjustment Board has determined that the Memorandum Agreement requires a change in petitioners' working conditions as embodied in agreements and has actually ordered a change in station forces, and abolition of positions with consequent impairment of seniority. See p. 32 of brief in support of this petition.

(2) This court has said many times that judicial relief is proper if a denial of that relief means a sacrifice or obliteration of a right which Congress has created.*

* Order of Railway Conductors of America v. Pitney (1946), 90 L. Ed. 279; Elgin, Joliet and Eastern R. Company v. Burley, 325 U. S. 711, affirmed after rehearing, 90 L. Ed. 706; Steele v. L. & N. R. R. Co. (1944), 323 U. S. 192; Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks (1930), 281 U. S. 548.

The court below has denied relief, notwithstanding that such denial means sacrifice and obliteration of two statutory rights created by Congress in the Railway Labor Act:

(a) The decision of the court below means a sacrifice and obliteration of the right of these individual petitioners to notice of hearing and hearing, as employees involved, before the Adjustment Board, as is required by Section 3, First (j) of the Act;

(b) The decision of the court below results in a sacrifice and obliteration of the petitioners' right to have 30 days' notice of an intended change in working conditions, as provided for in Section 2, Seventh, and Section 6 of the Act.

(3) The court below refused to invalidate awards of the Adjustment Board entered pursuant to administrative action, which violated the requirements prescribed by this Court in Order of Railway Conductors v. Pitney (1946), 90 L. Ed. 279.

The awards attacked herein show that the Adjustment Board reached its decisions in these awards in conscious disregard for the rights of employees not covered by the contract of the organization submitting the claim (R. 178); the awards herein attacked recite that the Adjustment Board believed that it could not consider the contracts of two crafts; that it could consider the contract of only one craft, that of the craft submitting the claim (R. 178). This is directly contrary to the doctrine of this Court in the Pitney case. The Pitney case supports the contention of the petitioners that the Adjustment Board was required to consider the B. R. C.'s Memorandum Agreement in the light of the carrier's agreements with the O. R. T. (see p. 34 of Petitioners' brief in support of petition for certiorari).

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Eighth Circuit commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals in the above entitled case, numbered on its docket as 13225, to the end that this case may be reviewed and determined by this Court, as provided by the statutes of the United States, that the decision and decree of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated August 28th, 1946.

Respectfully submitted.

THE ORDER OF RAILROAD TELEGRAPHERS, V. O. GARDNER, W. I. CHRISTOPHER, J. M. BRUCE, H. E. MILLER, L. F. MOORE and A. J. FUSELIER,

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Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINION OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit appears at pages 707-715 of the Record and is reported in ....

The opinion of the District Court appears at pages 645-672 of the Record, and is reported in 61 F. Supp. 869.

II.

JURISDICTION.

The date of the opinion to be reviewed is June 24, 1946. Petition for Rehearing was denied on August 1, 1946. Copy of said Order denying Petition for Rehearing appears at page 732 of the Record.

The statutory provisions which are believed to sustain the jurisdiction of this Court are set forth in the Petition for Writ of Certiorari, filed herewith, and are briefly as follows: 28 USC 347; Section 24 (8) of the Judicial Code (28 USCA 41 [8]); 24 (1) of the Judicial Code (28 USCA 41 [1]).

III.

STATEMENT OF THE CASE.

A general statement of the case appears in the preceding Petition, which is hereby adopted and made a part of this Brief.

IV.

SPECIFICATION OF ERRORS.

(1) The court below erred in returning this case to the District Court with directions to the appellants to commence new proceedings before the Adjustment Board for an interpretation of the petitioners' contract.

(2) The court erred in failing to hold that the Memorandum Agreement is illegal and void under the terms of the Railway Labor Act (45 U. S. C. A. 151-188).

(3) The court erred in failing to hold that the awards of the Adjustment Board, 2253-2258, inclusive, should be held for naught and the carriers enjoined from the enforcement thereof.

V.

ARGUMENT.

SUMMARY STATEMENT OF ARGUMENT.

(1) **The court below has denied relief in returning this case to the District Court with directions to the appellants to commence new proceedings before the Adjustment Board for an interpretation of the petitioners' contract.**

(a) The futility of further proceedings before the Adjustment Board is admitted by the respondents.

(b) The court below overlooked the fact that the Memorandum Agreement has been interpreted by the Adjustment Board.

(c) Filing new proceedings before the Adjustment Board would have no effect upon awards 2253-2258 entered without hearing to these petitioners.

(2) **The court erred in failing to hold that the Memorandum Agreement is illegal and void under the terms of the Railway Labor Act.**

(3) **The court erred in failing to hold that the awards of the Adjustment Board, 2253-2258, inclusive, should be held for naught and enforcement thereof enjoined.**

(a) The petitioners are "employees involved" within the meaning of Section 3, First (j) of the Railway Labor Act and were entitled to hearing under the provisions of the Act.

(b) The petitioners were entitled to hearing under ordinary principles of due process.

(c) The Adjustment Board violated the elementary principles of fair play in arriving at its awards 2253-2258.

ARGUMENT.

I.

The Court Below Erred in Returning This Case to the District Court With Directions to the Appellants to Commence New Proceedings Before the Adjustment Board for an Interpretation of the Petitioners' Contract.

(a) **The futility of further proceedings before the Adjustment Board is admitted by the respondents.**

The petitioners alleged in their petition that they had exhausted their administrative remedies under the Railway Labor Act and that it would be futile and vain for these petitioners to resort to the National Railroad Adjustment Board for an adjudication of their rights (R. 24). The respondents recognized the futility of such procedure by the telegraphers and stated in their answer as follows (R. 119):

> "It is further admitted . . . that any award which the plaintiffs might secure from the National Railroad Adjustment Board on their part **interpreting the telegraphers' agreement** would not be binding upon the B. R. C., and that the B. R. C. would not be permitted to become a party to a proceeding wherein such an award might be sought . . ." (Emphasis ours.)

Why is it admittedly futile for the telegraphers to take their grievance here to the Adjustment Board (even if we overlook the patent fact that in the meantime the station forces will be rearranged and the individual telegraphers will lose their jobs)?

Well, in the first place, the rules of the Adjustment Board contain no provision giving opportunity to third parties to present their contracts and the customs affecting both crafts involved.

The rules of the Board (R. 277) and the Rules of the Third Division (R. 281) are silent with respect to notice of hearing to third parties (R. 586). The rules make no provision for or against such hearings. The custom of the Third Division in giving even "all concerned" notice is inconsistent and variable (R. 267-273).

We are told that this policy was founded in the fear that if third parties were allowed in a bipartisan controversy, all sorts of "rump" unions would be brought in by the carriers. Well, that danger is now a thing of the past; it is generally acknowledged that "rump" unions are practically non-existent in the railroad field.* Furthermore, the danger can still be met by recognizing only individual rights, which is all we ask here.

The Board has, furthermore, deliberately taken the position that it cannot hear third party "employees involved." In the awards attacked herein the Board states that it can consider the contract of only one organization at a time, namely, the contract of the organization submitting the claim to the Adjustment Board (R. 177 and R. 180). The Board has refused to consider the contracts of the petitioners in construing, interpreting and applying the respondents' Memorandum Agreement. By the same token the Board would refuse to consider contracts of the clerks in construing the petitioners' contract. We get nowhere by such ex parte procedure which excludes "employees involved." In effect, the opinion of the court below recommends two incomplete hearings to take the place of one comprehensive hearing.

It is not within the power of these petitioners to reform the procedure of the Board. The suggestion is futile.

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* "Representation by National Organizations is practically complete." See Eleventh Annual Report of the National Mediation Board for fiscal year ended June 30, 1945, pp. 20-25.

(b) **The court below overlooked the fact that the Memorandum Agreement has been interpreted by the Adjustment Board.**

The court below sought to follow the Pitney case but erroneously ruled that the petitioners should go to the Adjustment Board for an interpretation **of their own contract,** with the following explanation:

> "Finally, no injunction should issue to restrain the enforcement of a labor contract before it has been interpreted by the Adjustment Board, even though injury had been sustained" (R. 713).

The court below failed to realize that the purpose of this suit is **not** to restrain the enforcement of the petitioners' contract, but rather the Memorandum Agreement, which has already been interpreted by the Adjustment Board. It is fundamental that the Adjustment Board has interpreted the Memorandum Agreement as requiring abolition of the positions of telegraphers as shown specifically in the cases of petitioners Miller, Moore and Fuselier. The positions of Miller, Moore and Fuselier are listed in the collective contracts of the O. R. T. In the Pitney case this Court denied injunctive relief until the Adjustment Board had been given an opportunity to determine whether the alleged illegal contract changed the working conditions of another craft in violation of Section 6. In the case at bar the interpretations of the Memorandum Agreement by the Adjustment Board require changes in the rules and working conditions of the individual petitioners. It is admitted that the Memorandum Agreement was executed without notice to the petitioners or their representative. Is it not error for a court under these circumstances to direct the petitioners to commence a proceeding before the Adjustment Board for the interpretation of their own contract, especially after the Board

has refused to consider the "legality" of contracts and has even refused to hear petitioners in proceedings for interpretation of the alleged illegal contract?

(c) Filing new proceedings before the Adjustment Board would not invalidate awards 2253-2258. Does the court believe that the Board will reverse its own awards without court direction?

It is manifest that the proposal of the court below that the petitioners commence their own proceeding before the Adjustment Board offers no protection to the jobs and positions of the individual petitioners Miller, Moore and Fuselier or other employees on the seniority list, interested in such positions. They will be "out of a job" and with others on the seniority list, their seniority rights will be impaired (R. 407-410; R. 433-435). The only adequate remedy is to enjoin the enforcement of awards attacked in Count II. The awards contemplated "rearrangement" of the station forces and abolition of the positions of these petitioners. Even assuming that the petitioners could obtain awards **inconsistent** with the awards 2253-2258, petitioners' employment rights and seniority would be threatened and lost by the enforcement of the awards 2253-2258. Inconsistent awards of the Adjustment Board would not vacate the awards herein attacked. Certainly the petitioners cannot hope that the Adjustment Board, in a proceeding brought by the petitioners against the respondent carriers, would vacate awards entered in a proceeding to which only the respondent carriers and the B. R. C. were parties. Petitioners submit that the court below erred in failing to hold invalid awards 2253-2258 and erred in directing these petitioners to commence an independent proceeding before the Adjustment Board for an interpretation of their own contract, which is not the alleged illegal contract.

Petitioners are in immediate jeopardy. The court below overlooked the immediate jeopardy of the individual petitioners. The record shows that the carrier and the B. R. C. submitted the Memorandum Agreement to arbitration in a proceeding to which petitioners were not parties. The arbitrator ruled that the Memorandum Agreement should "continue in effect" (R. 297).

Furthermore, counsel for petitioners is in receipt of a letter from counsel for the carriers since the decision of the Circuit Court of Appeals, reading in part as follows: "I have felt obliged to advise that we are exposing ourselves to penalties if we do not assign and distribute the work at various stations in line with the Memorandum Agreement of November 1, 1940 with the Clerks which was recently upheld in arbitration" (R. 727).

It will do the petitioners little good to go to the Adjustment Board for an interpretation of their own contract after the station forces are rearranged so as to abolish petitioners' jobs.

II.

The Court Erred in Failing to Hold That the Memorandum Agreement Is Illegal and Void Under the Terms of the Railway Labor Act.

The provisions of Section 2, Seventh, and Section 6 of the Railway Labor Act prohibit a change in rates of pay, rules, working conditions or established practices unless notice of such change is given by the carrier.

Subsection 7 of Section 2 reads as follows:

> "No carrier, its officers or agents, shall change the rates of pay, rules or working conditions of its employees, as a class, as embodied in such agreements or in Section 6 of this Act." 45 USCA 152.

Section 6 reads as follows:

> "Carriers and representatives of the employees shall give at least 30 days' written notice of an intended change in agreements affecting rates of pay, rules or working conditions. . . . " 45 USCA 156.

These same statutory commands are binding upon trustees of railroads under the requirements of Section 77 (n) of the Bankruptcy Act (11 USCA 205).

Essential facts are admitted. In the instant case two facts essential to the charge of illegality are formally admitted: (1) That the Memorandum Agreement was executed without prior notice [see R. 507 for carriers' admission; for the respondent B. R. C.'s admission see paragraph 18 of Request for Admissions under Rule 36 (R. 523) and B. R. C.'s reply thereto (R. 524)]; (2) that at the time that the Memorandum Agreement was negotiated the telegraphers were performing clerical work (R. 522, 524).*

There is no doubt that the telegraphers have for many years performed clerical work, and there is no doubt that the Memorandum Agreement, as interpreted by the B. R. C. and the Adjustment Board, provided for monopolistic

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* The O. R. T. introduced in evidence seven agreements between the respondent carriers and the Order of Railroad Telegraphers. The position of "telegrapher-clerk" was listed in the rate schedules of all the agreements except the 1930 agreement, which substituted the term "telegrapher" for "telegrapher clerk," with the understanding that "in the future telegraphers would continue to do clerical work" (R. 483, 485). The 1940 agreement of the telegraphers lists the position of "telegrapher clerk" (R. 66-70). The individual petitioners described the duties of their positions as including at all times a large proportion of clerical work (Bruce, R. 381; Miller, R. 393-95; Fuselier, R. 403-06; Moore, R. 318-23). The Rule Books of the respondent carriers were introduced in evidence. The current Rule Book provides that operators (telegraphers) "must assist in clerical work or other station service" (R. 381-82). The preceding Rule Book, issued in 1930, provides that operators "are expected to assist in clerical and other station services when called upon, their wire duties permitting" (R. 379). Historically, during the Railroad Administration of the government during World War I, the government orders fixing rates for clerks covered clerical positions, expressly excepting those of the telegraphers. Article I of Supplement 7 to General Order 27 defined "clerks" in station service but expressly provided, "excepting such as come within the scope of existing agreements or those hereafter negotiated with the railroad telegraphers" (R. 439).

rights to clerical work in favor of the craft represented by the B. R. C. to the exclusion of telegraphers and other crafts. By the Memorandum Agreement the carrier and the B. R. C. intended to bring about a change in the rules and working conditions of individual petitioners and those similarly situated, as embodied in agreements.

The Memorandum Agreement, as construed by the B. R. C. and the Adjustment Board, excludes telegraphers from clerical work. Claims were filed with the Adjustment Board by the respondent B. R. C. on the theory that the Memorandum Agreement gave the B. R. C.'s craft a monopoly of clerical work on the lines of the respondent carrier. For example, the B. R. C., in the submission resulting in award 2255, insisted that the Memorandum Agreement required the respondent carrier to rearrange the station forces at Opelousas, Louisiana, so as to abolish the position of assistant-agent, occupied by petitioner Moore, and substitute a cashier, a position listed in the Clerks' Agreement (R. 515, 575).

The B. R. C., in the submission resulting in award 2253, insisted that the Memorandum Agreement required the respondent carrier to rearrange the station forces at Eunice, Louisiana, so as to abolish the position of telegrapher, occupied by petitioner Fuselier, and substitute a cashier, a position listed in the Clerks' Agreement (R. 513, 577).

It is respectfully submitted that the court erred in failing to hold that the Memorandum Agreement is illegal and void under the terms of the Railway Labor Act. The facts supporting the charge of illegality are clear: (1) The telegraphers have been required to perform clerical work by their agreements for many years; (2) the Memorandum Agreement excluded the performance of clerical work by members of the telegraphers' craft; (3) the Memorandum Agreement was executed without notice to the telegra-

phers' craft; (4) the awards of the Adjustment Board construe the Memorandum Agreement as requiring changes in the rules and working conditions of the members of the telegraphers' craft. Thus, we have here a Memorandum Agreement which changes petitioners' working conditions without notice to them, in violation of the Act, and which the court below has refused to invalidate.

III.

The Court Erred in Failing to Hold That the Awards of the Adjustment Board, 2253-2258, Inclusive, Should Be Held for Naught and Enforcement Thereof Enjoined.

(a) **The petitioners are "employees involved" within the meaning of Section 3, First (j), of the Railway Labor Act and were entitled to hearing under the provisions of the Act.**

The Railway Labor Act requires the National Railroad Adjustment Board to give notice of all hearings to "employees involved." Section 3, First (j), of the Act is as follows:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

The statement of the claims of the respondent B. R. C. before the Adjustment Board was that the carrier was permitting employees not covered by the Clerks' Agreement to do work covered by the Agreement. It is abundantly clear that when a claimant seeks to displace an employee or deprive him of his work, such latter employee is vitally concerned and is therefore "involved."

Claims of the B. R. C. ask for rearrangement of the respondents' station forces and abolition of telegraphers' positions. It has been noted earlier in this brief that in the submissions resulting in awards 2253-2258, the B. R. C. sought rearrangement of the station forces on the lines of the respondent carriers. As above stated, the B. R. C. insisted that the Memorandum Agreement required the carriers to substitute a cashier's position (Clerks' craft) at Opelousas, Louisiana, for the position of assistant agent, occupied by petitioner Moore (R. 515, 575); the B. R. C. insisted that the Memorandum Agreement required the carriers to abolish the position of day-shift telegrapher at Eunice, Louisiana, occupied by petitioner Fuselier, and substitute therefor a cashier's position (Clerks' craft) (R. 513); the B. R. C. insisted that the Memorandum Agreement required the carrier to abolish the position of day-shift telegrapher at Anchorage, Louisiana, and substitute the position of clerk (R. 199, 514). The awards were all sustained and enforcement of these awards threatened the employment and seniority rights of these petitioners.

The pleadings allege, the parties stipulated, and the district court found that the petitioners sought to intervene and be heard by the Board, but that intervention was denied. The stipulated facts show that no notice was given of any hearing and no oral hearings were held, either before or after the appointment of Referee Swaim, who decided the cases (R. 153). Board Member Sylvester of the B. R. C. admitted that "there was no hearing held for anyone" (R. 596).

Section 3, First (j), of the Act was construed in **Estes v. Union Terminal Company** (CCA 5th, 1937), 89 Fed. (2d) 768. This suit was brought by a member of the B. R. C. to enforce an award of the Adjustment Board. The Union Terminal Company refused to apply the award because the Adjustment Board had failed to give notice to one Lane,

who was not covered by the Clerks' contract. The order of the Board required dismissal of Lane. **The court refused to enforce the award.** It held that Lane was a "person involved" and that the Board was in error in failing to give notice to him. The court held that "in justice and fairness every person who may be adversely affected by an order entered by the Board should be given reasonable notice of hearing." In the instant case the Eighth Circuit Court of Appeals has refused to invalidate awards of the Board adversely affecting petitioners, entered without notice of hearing.

The reasoning of the Adjustment Board in awards attacked herein is contrary to the rulings of the courts. The reasoning of the Board in the cases here involved is the same in all awards, but is set out in more detail in Award 2253. Referee Swaim, sitting with the Board in Awards 2253-2258, held that Section 3, First (j), of the Railway Labor Act "only requires notice of hearing to the **organization** submitting the claim to the Adjustment Board" (R. 178; emphasis ours). Referee Swaim stated that an employee not represented by the organization submitting the claim and not covered by the contract before the Adjustment Board for interpretation is not entitled to notice of hearings (R. 180).

In **Estes v. Union Terminal Company**, supra, the Circuit Court of Appeals for the Fifth Circuit held that an employee was entitled to notice of hearing, notwithstanding the fact that "he was not covered by the provisions of the contract", before the Adjustment Board for interpretation.

Referee Swaim reasoned in award 2253 that Section 3, First (j) of the Act required notice to "parties" and that the only "parties" involved in a dispute were the "parties who negotiated and executed the agreement" (R. 178). In the recent case of **Elgin, Joliet and Eastern R. Co. v.**

Burley (1945), 325 U. S. 711, this Court held that the term "parties" includes individuals involved, and not solely the collective bargaining agents.

In award 2253 Referee Swaim stated that the Adjustment Board can consider only one contract at a time, and that the Adjustment Board could not be concerned with the scope rules of other crafts. This line of reasoning is in direct conflict with the Supreme Court decision in **Order of Railway Conductors v. Pitney**, supra, where this Court said (l. c. 90 L. Ed. 283):

> "The record shows, however, that interpretation of these contracts involves more than the mere construction of a document in terms of the ordinary meanings of the words and their position. See Brown Lumber Co. v. L. & N. R. Co., 299 U. S. 393-396; Great Northern Ry. Co. v. Merchants Elevator Co., 291 U. S. 259-285. The O. R. C.'s agreement with the railroad must be read in the light of others between the railroad and the B. R. T. Since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that, too, must be taken into account and properly understood."

Petitioners respectfully submit that the B. R. C.'s Memorandum Agreement with the respondent carriers must be interpreted in the light of the carriers' contracts with other organizations. The usage, practice and custom must be taken into account and properly understood by the Adjustment Board. Is this not a sensible way to interpret and apply agreements, namely, to hear all those involved, including those adversely affected? Does the law negative such a sensible method?

(b) **The petitioners were entitled to hearing under ordinary principles of due process.**

The petitioners have contended throughout this litigation that the statute should be construed as requiring notice and hearing to the petitioners. But if it should be

held that the statute does not provide and require such hearing, then the awards 2253-2258 were entered in violation of the Constitutional requirements of due process of law.

It is well established that an employee has a property right in his employment contract, especially where seniority is involved. **Truax v. Raitch** (1915), 239 U. S. 33; **Nord v. Griffin**, supra. Petitioners believe that the Adjustment Board is subject to Constitutional limitations and that petitioners are entitled to be heard before their property rights are adjudicated. The failure to grant them hearing violates the elementary principles of due process.

The leading case is **Nord v. Griffin**, 86 Fed. (2d) 481, decided by the Circuit Court of Appeals, Seventh Circuit, in 1936; certiorari denied, 300 U. S. 673. In many respects the case is comparable to the case at bar. It was an action by an individual employee of the Chicago Union Station Company against members of the Brotherhood of Railroad Trainmen and the Chicago Union Station Company to enjoin the enforcement of an award of the Adjustment Board. The plaintiff was not a party to the proceeding and received no notice of hearing upon which the award was based. The award precluded the plaintiff from "continuing work".

The Seventh Circuit Court of Appeals said that the controversy involved

> "solely the question of whether the appellee is to be bound by an order of an administrative board in a proceeding to which he was not a party, entered at a hearing of which he had no notice. The mere statement of the proposition is conclusive of its unsoundness. The rights of plaintiff are protected by the Fifth Amendment.
>
> "Clearly, the award, so far as appellee was concerned, was in violation of his rights under the Fifth Amendment to the Constitution, and it was the court's duty, with jurisdiction of the subject-matter and of the parties, to award the injunction."

The facts of the above case are comparable to the case at bar, in that in both we have individuals seeking an injunction to restrain the enforcement of awards of the Adjustment Board depriving them of their seniority rights, entered in a proceeding to which they were not a party. While the facts in the two cases are comparable, the Circuit Court of Appeals, Seventh Circuit, and the court below have reached conflicting decisions.

(c) **The Adjustment Board violated the elementary principles of fair play in arriving at its awards 2253-2258.**

The court need have no compunction in enjoining enforcement by the carriers of these awards. The procedure of the Board in these very cases reveals administrative manipulation quite out of keeping with the exercise of quasi-judicial functions. The limitations upon administrative tribunals are not as yet very clearly defined, but this Court has prescribed one general limitation. The ordinary rules of fair play must be observed. **Morgan v. U. S.** (1937), 304 U. S. 1.

The flagrant disregard of orderly procedure by the Adjustment Board in claims resulting in awards 2253-2258 is set forth in a stipulation of fact, which is based largely upon depositions taken at the Board's office in Chicago. The stipulation appears at R. 145-157.

Removal of H. C. Kearby of the O. R. T. Shortly before filing the claims here in issue, George M. Harrison, President of the B. R. C., called a meeting of the railroad labor organizations represented on the Third Division for the purpose of removing H. C. Kearby of the O. R. T. from the Division (R. 147). Mr. Harrison introduced a resolution calling for the removal of Mr. Kearby and the appointment of a substitute to be named by the President of the Hotel and Restaurant Employees International Alliance and Bartenders International League of America (R.

148-149). A certain Miller, the nominee then appointed in Kearby's place, was conspicuously absent from meetings of the Board, from the time of his appointment in September until his resignation in February (R. 150).

After the removal of Kearby, the B. R. C. filed the six claims resulting in the awards herein attacked. The Board directed that "all concerned" notices, stating that hearing on the claims would be held on November 12, 1943, be posted at the stations and points affected (R. 152). Twenty-two individual telegraphers requested a hearing and authorized the O. R. T. to represent them (R. 153, 255). The requests stated that if the claims were sustained, work would be removed from their positions and that such a change would adversely affect the seniority rights of petitioners (R. 255).

The hearing set for November 12, 1943 was never held. Indeed, as admitted by Board Member Sylvester of the B. R. C., "there was no hearing held for anyone" (R. 596). The Board ignored the petitioners' requests to intervene. Even a motion that the Secretary of the Division show at least the "courtesy of a reply to Mr. Gardner's" inquiry concerning the petitioners' requests failed (R. 157).

The fictitious "Deadlock." On February 5, 1943, the labor members of the Adjustment Board certified that the claims here in question were deadlocked on the procedural issue of notice to "employees involved" (R. 154). The Mediation Board refused to appoint a referee on this showing (R. 155, 257-259). B. R. C. Member Sylvester, with two other labor members of the Board, then tried again. On March 9, 1943, the B. R. C. "cancelled and withdrew its request for oral hearing" (R. 268). On the next day, March 10, 1943, Sylvester proposed awards "dealing with the merits of the claims" (as he said), which failed of adoption (R. 155), and a Board deadlock was declared by him over the protests of member Cook,

who set forth in the minutes the fictitious character of the deadlock, the real nature of the difference between the Board members, and the fact that no hearing had been held upon the merits (R. 155).

It is obvious that there could be no customary "informal deadlocking"* by Sylvester. Labor member Miller had resigned by letter of February 17 (R. 150-151) and on account of Miller's vacancy no deadlock could be assumed. Five carrier members voted against the claims (R. 262-263) and there were only four other members on the Board. There could be no deadlock.

The labor members deliberately concealed the fact that Miller had resigned. The Mediation Board specifically inquired as to why letters of the labor members of the Board were signed by only three members (R. 602). In a letter dated April 8, the Mediation Board was erroneously advised that Miller had not signed previous letters because he (Miller) was absent from the city for "business reasons" (R. 602). Had the labor members advised the Mediation Board that Miller had resigned six weeks earlier on February 17, 1943 (R. 150-151), it is probable that the Mediation Board would have not appointed a referee. But the Mediation Board was not advised of the vacancy and appointed Referee Swaim on or about May 12, 1943 (R. 156).

Illegal appointment of successor to Miller. As above stated, Miller resigned February 17, 1943. On May 20, 1943, the official members of the National Railroad Labor Organizations qualified to participate in appointments to the Adjustment Board recognized that a vacancy existed by virtue of the resignation of E. S. Miller (R. 151). Now when was the succeeding member, Hugo Ernst, actually appointed? No meeting was called of the chief executives

* See Exhibit T of stipulation wherein it is stated that it is customary in the consideration of claims for the partisan members of the Board to assume that absent members of the Board would vote with the partisan members present.

until July 30, 1943 (R. 151), five months after Miller's resignation and **more than seventy days** after the vacancy had been recognized in the official minutes of the labor organizations concerned. Ernst was not elected until a meeting of the Third Division organizations on or about August 5, 1943, having been nominated then by President Harrison of the B. R. C. (R. 151). **Said nomination and said appointment were manifestly illegal and void under the terms of the Railway Labor Act, Section 3, First (d) and (e), which require the Mediation Board to make the appointment in the event the labor organizations concerned failed to make the appointment "within 30 days after such vacancy occurs."**[**]

Ernst was illegally appointed on August 5. He reported to the Board on August 8th or 9th (R. 609), and he voted on the awards August 10. Actually Ernst was not in office,—his vote should not have been counted. In each of these six claims, there was no award but a real deadlock (five carrier members on the one hand; Referee Swaim and four labor members on the other).

There was not only arbitrary denial of hearing to petitioners, but the procedure of the Board abounds in unscrupulous irregularity. It is difficult to conceive of a case presenting a more aggravated abuse of administrative discretion. We submit that the following language from the Court's opinion in **Morgan v. U. S.** (1937), 304 U. S. 1, is appropriate:

** Sections 3 (d) and (e) provide as follows:

"(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

"(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in the case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent."

> "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For as we have said at the outset, if these multiplying agencies, deemed to be necessary in our complex society, are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

CONCLUSION.

We submit that the questions presented in this case are of great importance and should be settled by this Court. Under the decision of the court below, the illegal Memorandum Agreement remains in effect with the added sanction of an arbitration award to which these petitioners were not parties. Under the decision of the court below, six awards of the Adjustment Board, entered after denial of hearing to these petitioners, still stand, threatening these petitioners and others of their craft with loss of positions and seniority rights.

We believe that a review of the decision of the court below will not only prevent irreparable injury to petitioners and others similarly situated, but will greatly clarify the procedure of collective bargaining and administrative procedures of the Adjustment Board under the terms of the Railway Labor Act.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

THE ORDER OF RAILROAD TELEGRAPHERS et al.,
Petitioners,

vs.

NEW ORLEANS, TEXAS AND MEXICO RAILWAY COMPANY et al.,
Respondents.

No. 449.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Petitioners respectfully submit this request for reconsideration of the petition for certiorari herein, and as ground therefor submit the following considerations, not advanced in the original petition:

I. It is peculiarly appropriate that this Court review the present case because both decisions below turned exclusively upon the interpretation of recent decisions of this Court under the Railway Labor Act.

II. The denial by the Circuit Court of Appeals of injunctive relief against the awards of the National Railroad Adjustment Board sought in Count II of the petition, coupled with the silence of the court on the issues of that Count, amounts to a complete denial of relief, and to a virtual abdication of the judicial function.

III. The record reveals that this controversy and even this very lawsuit are of nationwide interest to organized labor.

I.

It Is Peculiarly Appropriate That This Court Review the Present Case Because Both Decisions Below Turned Exclusively Upon the Interpretation of Recent Decisions of This Court Under the Railway Labor Act.

In the trial court this case was erroneously dismissed for "nonjusticiability" under a misapplication of the doctrine of this Court in **General Committee v. MK&T** (1943), 320 U. S. 338. Upon appeal the Circuit Court of Appeals held that the trial court was in error on the jurisdictional point, but under a misapplication of this Court's intervening decision in **O. R. C. v. Pitney** (1946), 326 U. S. 561, refused to order relief, not only refusing a judgment on the contract attacked, but also refusing to order an injunction against awards of the National Railroad Adjustment Board which deprived these petitioners of their jobs without notice and hearing.

The factual situation in all three of these cases is substantially the same, and comparatively simple: In each case the legal issues arose when one of the railroad crafts negotiated and contracted with the carrier to take away the jobs or work of another craft, not parties to the deal. By thus conniving with the carrier behind the backs of the other craft, the aggressive craft impaired or diminished the positions and seniority rights or work of the

third-party craft. In other words, the aggressive craft used collective bargaining to enlarge its work jurisdiction, inducing the carrier to forget or omit the requirements of the Railway Labor Act. In particular, Section 6 was violated, which requires 30 days notice to the craft affected before making any changes in its rules or working conditions.

Thus, in the case of **General Committee v. MK&T**, supra, the locomotive firemen sought to bargain with the carrier at the expense of the engineers (by regulating in their own favor certain work schedules) and this Court held (in the face of the argument that the firemen had exceeded their representative authority) that a dispute **as to representation** was within the exclusive and final jurisdiction of the Mediation Board and "non-justiciable" in a court action for declaratory judgment. Violation of Section 6 was not alleged or discussed.

Convinced that the doctrine of non-justiciability could not apply where a clear violation of Section 6 was alleged, petitioners filed this case, in March 1944, to have the illegal contract set aside (not challenging the authority of the respondent union to bargain for its own craft) but claiming a clear and deliberate violation of Section 6 of the Act by the carrier. The petitioners not only asked for a declaration that the offending contract was invalid, but also asked that its enforcement be denied, because in this case the clerks had obtained six awards of the Railroad Adjustment Board applying the contract and abolishing the positions of the petitioners on these railroad lines.

The trial court unfortunately failed to make the proper distinction on the facts and on the law, and dismissed this case on both counts, under an erroneous application of the doctrine of "non-justiciability" (R. 661).

The petitioners again suffer on appeal by a misapplication in the Circuit Court of Appeals of the intervening

decision of this Court in **O. R. C. v. Pitney** (1946), 326 U. S. 561. In the Pitney case the trainmen had contracted with the carrier at the expense of the conductors for certain work and services, and, for the first time in this Court, the grounds of illegality there alleged were that the carrier had no right to make a contract which changed the working conditions of the complaining craft without the 30-day notice required by Section 6 of the Railway Labor Act. This Court upheld the jurisdiction of the courts to relieve against a clear violation of the command of Section 6 of the statute; but it was further held that the Court should "stay its hand" until the Adjustment Board had "the first opportunity to pass on the issue."

Now, in the instant case, the Adjustment Board has had an "opportunity to pass on the issue"; the record shows, as the Pitney case requires, that there has been a clear violation of the command of the statute. We submit that it is a misapplication of the doctrine of the Pitney case to hold that there must be **two** proceedings before the Adjustment Board before the courts can act: one at the behest of the complaining craft to interpret its contract, and another at the behest of the invading craft to enforce its contract. We do not believe that it was the intention of this Court in the Pitney case to require two such proceedings, especially where, as in this case, the complaining craft demanded to be heard in the proceedings by the invading craft before the Board and was denied hearing (R. 153). Surely it was not the intention of the Court to say that it takes two erroneous rulings of the Adjustment Board to make one law suit. We do not believe that it was the intention of this Court in the Pitney case to hold that there must be one proceeding before the Adjustment Board to establish the wrong against the injured parties, and another proceeding before the Adjustment Board to establish the right of the injured parties.

As a matter of fact, the spirit and principle of the Pitney

case is that the courts will intervene when administrative remedies have been reasonably exhausted and a clear violation of the statute still appears. That is exactly what has happened in this case.

The injustice of requiring petitioners to bring a repetitious proceeding before the Adjustment Board in this particular case is shown further by the Board's own acknowledgment, in its awards, and the respondents' own acknowledgment, in the pleadings, that such a proceeding would be futile. The Board says in the very awards attacked that it cannot do what the dictum of the Pitney case requires, namely, consider the contracts and rights of the petitioners. The Board says (R. 180):

> "If this Board should find in these cases that the carrier has breached its agreement with the Clerks, there must be an award in favor of the Clerks; the Board's sole function is the interpretation and application of the agreement. It can not alter an agreement for the relief of either party, even though it might appear that the work was also covered by an agreement with the third parties."

We have heretofore called the attention of the court to the admission by the respondents that it would be futile for these petitioners to bring an independent proceeding before the Board. Petitioners so allege in their petition (R. 24), and respondents admit the truth of the allegation in their answer (R. 119).

Exhaustion of Administrative Remedies.

We summarize for the court the following undisputed facts, which show that these petitioners have exhausted their administrative remedies in this case.

(1) The contract by which the Clerks in this case sought to bargain with the carrier at the expense of the

petitioners has already been interpreted and enforced by the National Railroad Adjustment Board in the awards attacked in the petition and set forth in the record (R. 162-248). The Adjustment Board has already acted, thus complying with the condition mentioned by this Court in the Pitney case as follows:

> "Only after the Adjustment Board acts but not until then can it plainly appear that such relief was necessary to insure compliance with the statute. Until such time, O. R. C. can not show irreparable loss and inadequacy of the legal remedy."

These petitioners have pleaded and proved in court the very awards under which the Adjustment Board interpreted the contract complained of, and sought relief against their enforcement. The very employees (Miller, Moore and Fuselier) who would lose positions under these awards, testified in court. Their positions, abolished by these awards, were specifically listed in their own contracts, which were in turn pleaded and introduced in evidence (R. 65-71).

By what logic can the Court of Appeals require a further "interpretation" by the Adjustment Board? What is there to "interpret" about a job listed in a contract and abolished?

(2) The individual petitioners sought in this case, by written demand, to intervene and be heard by the Board in the proceedings before the Board for enforcement of the illegal contract and were denied hearing (R. 153, 255). Was this not a logical method of complying with the very direction of this Court in the Pitney case that the Board should consider the contracts of other crafts where there is an interference, as in this case? That is what the petitioners sought to do and that is what the Board refused to do (R. 177-185).

(3) The direction of the Circuit Court of Appeals not only places upon the petitioners the burden of inducing the Board to reverse itself on the facts of this case, but also compels these petitioners to induce the Board to reverse its traditional practice (R. 177-185) without any ruling of the court on the practice in question. The Board has said, in the claims submitted to the court, that its sole function is the interpretation and application of the agreement before it and that it could not alter any agreement for the relief of any other party (R. 180). The court has not ruled that the Board is wrong. It does not set aside the awards entered upon that theory. It simply calls for more awards.

(4) The burden cast upon these petitioners is particularly heavy in this case. The irony contained in the direction of the Circuit Court of Appeals is manifest when it is realized that, as the record shows, the representative of the petitioning union has been removed from the Board (R. 148), while the representative of the respondent union is still a member of the Board (R. 596). There is, furthermore, ample indication in the record that the labor members of the entire Division are dominated by the respondent union (R. 148-152). Does this Court ask this petitioner to resort for impartial decision to such a tribunal? Is it likely that the Board will cheerfully entertain the grievances of these petitioners filed under authority of this lawsuit? Furthermore, this very lawsuit has been condemned by the Executive Council of the American Federation of Labor, a condemnation affirmed in part by the Annual Convention of the American Federation of Labor (R. 303-306).

Petitioners therefore submit that this Court should take jurisdiction of the case and clarify the dictum in the Pitney case by holding that where a violation of the com-

mand of the statute is clearly shown and the petitioners have exhausted their administrative remedy to the extent shown in this case, then the Court should relieve the aggrieved craft by invalidating the unlawful contract and enjoining the carrier from enforcing the awards of the Adjustment Board.

These petitioners have never and do not now ask the Court to determine the merits of a jurisdictional dispute. We submit merely that since collective bargaining and grievance procedure in the railway labor field is now regulated by law that it is the function of the courts to supervise the administration of the law, where all practicable measures have been taken for relief and where violation of the law is clearly demonstrated by the admitted facts, as in the present case.

II.

The Denial by the Circuit Court of Appeals of Injunctive Relief Against the Awards of the National Railroad Adjustment Board Sought in Count II of the Petition, Coupled With the Silence of the Court on the Issues of That Count, Amounts to a Complete Denial of Relief and to a Virtual Abdication of the Judicial Function.

It is manifest from the above that there is no occasion to remit these petitioners to the Board for further procedure. In addition, the Circuit Court of Appeals is silent with respect to Count II of the petition, which seeks an injunction to prevent the carrier from enforcing the awards of the Adjustment Board because those awards called for the abolition of petitioners' positions, and were entered without notice or hearing to these petitioners. The Circuit Court of Appeals simply vacates, without comment, the decision of the District Court which denied injunctive relief. No instructions or guidance is given to the

trial court as to what it is to do with respect to the prayer of the petition.

Under the facts of this case there are orders of the Adjustment Board outstanding still binding upon the carrier and still subjecting the jobs of these petitioners to abolition, without hearing.

The Issue Presented Is a Simple Denial of Due Process of Law.

Even if this Court is not ready to declare the contract invalid, the petitioners are entitled to injunctive relief on Count II. The awards attacked were entered without notice or hearing to these petitioners. It is not necessary to decide under Count II that the contract in issue was invalid. All that is necessary to decide under Count II was that an employee may not, without hearing of any kind, be deprived of his job and seniority rights by the order of this administrative board. The Circuit Court of Appeals is entirely silent on the issue. It does not decide anything about the rights of an employee to retain his job free from interference of an administrative board, absent notice and hearing. Surely, these petitioners are entitled to some ruling on this issue.

III.

The Record Reveals That This Controversy and Even This Very Lawsuit Are of Nationwide Interest to Organized Labor.

We believe that the Court will agree that the issues presented above are of real importance to organized labor generally and in particular to the effective administration of the Railway Labor Act.

Such a conclusion need not be left to inference. It happens that the record shows that this controversy, and even this very lawsuit, have had the repeated attention of the

railroad brotherhoods and even the American Federation of Labor. Strictly on the record, we mention below a few of the circumstances, indicating the importance of the case, which were not mentioned in the petition for certiorari herein:

(1) The chief executives of the "Nationally Organized Railway Labor Organizations Qualified to Participate in the Formation of the National Railroad Adjustment Board" deemed the issues before the Third Division of the National Railroad Adjustment Board between these very organizations and on these very railroad lines of sufficient importance to vote a change in the personnel of the Third Division, excluding the representative of the petitioning craft from membership thereon (R. 149).

(2) The controversy in the National Railroad Adjustment Board over deadlocking of the awards attacked in the petition was of sufficient importance to call for the ruling of the National Mediation Board (R. 155, 156).

(3) After this lawsuit was filed the respondent Brotherhood deemed the lawsuit of such importance that it filed a complaint against The Order of Railroad Telegraphers with the Executive Council of the American Federation of Labor and that body "deplored" the action of the petitioning organization in bringing this lawsuit (R. 305). This decision of the Executive Council was deemed of sufficient importance to be taken to the Annual Convention of the American Federation of Labor in 1944 and the petitioning Order was requested to abandon this very suit "as contrary to and in violation of the long established policy of the American Federation of Labor to oppose the use of the injunction against labor unions in labor disputes" (R. 305).*

*It is needless to say that this action was against the respondent carriers as well as respondent union and is not an ordinary "injunction suit." It should, however, be said that the American Federation of Labor was apparently not advised either of the facts or of the legal issues.

Explaining the Silence of the Respondents.

The Court may have gained the impression that because neither the carrier respondents nor the labor union respondents in this case filed any opposition to the petition herein, that it is of little importance.

The carrier has been "playing possum" in this case. The carrier failed to file any briefs and did not participate in the argument on appeal. The carrier has manifestly changed its position in the course of this controversy so many times that it is not in a position to appear in court. In choosing a vacillating course "between two fires" it has violated both law and principle and is apparently not in a position to rest its case on either.

As for the respondent B. R. C., it no doubt feels at this time that it can profit from the decision of the Circuit Court of Appeals which relegates your petitioners to the Adjustment Board, on which it is represented and on which these petitioners are not represented.

Aside from the denial of justice to these petitioners, it is respectfully submitted that the subject matter involved is of such importance as to require a reconsideration and the granting of a writ of certiorari in this case.

R. WALSTON CHUBB,
Attorney for the Petitioners.

LEWIS, RICE, TUCKER, ALLEN & CHUBB,
RALPH E. KENNEDY,
Of Counsel.

R. Walston Chubb, attorney for petitioners herein, does hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

R. Walston Chubb,
Attorney.

November 6th, 1946.